

DECISION
of the First Board of Appeal
7 October 2022

In Case R 208/2022-1

HUMMEL HOLDING A/S

Balticagade 20
8000 Aarhus C
Denmark

Applicant/Appellant

represented by PATRADE A/S, Ceresby75, 8000 Aarhus C, Denmark

KLAGE relating to EU trade mark application No 18 256 549

THE FIRST BOARD OF APPEAL

composed of G. Humphreys (Chair), M. Bra (Rapporteur) and A. González Fernández (Member)

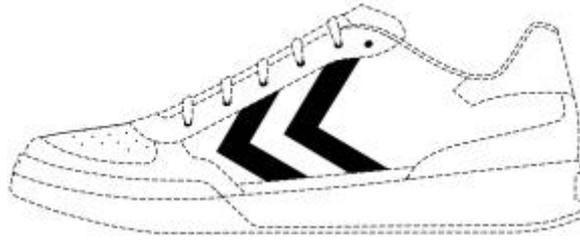
Registrar: H. Dijkema

has taken the following

Decision

Summary of the facts

- 1 By application filed on 17 June 2020, Hummel HOLDING A/S ('the applicant') sought registration of the trade mark.



for the following list of restricted goods as at 2 September 2020:

Class 25 – Footwear, namely leisure shoes and sports shoes.

- 2 On 14 July 2020, the applicant informed the applicant that the trade mark could not be registered in respect of all the goods applied for under Article 7(1)(b) EUTMR.
- 3 On 11 September 2020, the applicant submitted its observations. The applicant also claims that, in the event that the objection of lack of distinctive character is itself upheld, the applicant seeks, in the alternative, a claim for distinctive character acquired through use (in the alternative).
- 4 On 9 December 2020, the examiner adopted a decision rejecting in full the trade mark applied for pursuant to Article 7(1)(b) and Article 7(2) EUTMR. That decision became final.
- 5 On 23 February 2021, the applicant submitted the following evidence in support of its claim of distinctive character acquired through use:

Market research activities

- Denmark, Epog, September 2013 and November 2016, respectively 1 000 and 2 000 respondents, shoes with applicant's angles represented, respondents recognise shoes with angles as Hummel (applicant)
- Poland, market analysis company unknown, March 2021, 125 respondents, shoes with applicant's angles represented, respondents recognise shoes with angles as Hummel.

Declarations

Sport organisations that are direct beneficiaries of official sponsorship from the applicant:

- 22 April 2021, international Handball Federation (IHF), signed by Director-General Amal Khalifa, applicant has been official sponsor of IHF from 2018 to d.d., position mark mentioned, applicant's trade marks are known and recognised in most European handball federations.
- 14 April 2021, European Handball Federation (EHF), signed by Martin Hauleitner, Secretary-General, official sponsor from 2020 to d.d., position mark mentioned, applicant's trade marks known and recognised by the majority of European handball federations.
- 29 April 2021, South East Handball Association (SEHA), signed by Executive Director, Sinisa Ostoic, applicant has been official sponsor from 2018 to d.d., position mark mentioned, applicant's trade marks are known and recognised in the majority of European handball federations.

All the above statements conclude that the angles:

- in our view, it is clearly attributable to Hummel
 - have been massively promoted and exposed in the European population;
 - is historically iconic in the context of European handball
 - are known and recognised by the vast majority in the European handball environment.
- 1 October 2020, Danish Boldpil Union (DBU), signed by Deputy Director Kenneth Reeh, the applicant has been the official sponsor of DBU from 1979 to 2004 and from 2016 to d.d., the applicant's angles, including on shoes, are known and recognised by the majority of the Danish population.
 - 2 October 2020, Brøndbys Idbruts Forening (Brøndby IF), signed by Leo Ekbacks, the applicant has been the official sponsor of Brøndby IF from 1986 to 1996 and from 2012 to d.d., the applicant's angles, including on shoes, are known and recognised by the majority of the Danish population.
 - 2 October 2020, Aarhus Gtungsstik Forening (AGF), signed, the applicant has been the official sponsor of AGF from 1981 to 1990 and from 2001 to d.d., the applicant's angles, including on shoes, are known and recognised by the majority of the Danish population.

All the above statements conclude that the angles:

- in our view, it is clearly attributable to Hummel
- has been massively promoted and exposed in the Danish population;
- is historically iconic in connection with Danish handball
- is known and recognised by the vast majority of the Danish population.

Other sports organisations

- 8 January 2020, Lithuanian Football Federation (LFF), signed by LFF President Tomas Dailevicius, the applicant has been the sponsor of the Lithuanian national football team for several years, position mark mentioned, position mark known in Lithuania.
- 10 June 2021, Nederlands Handball Verbond (NHV), signed, applicant has been the sponsor of the Dutch football team from 1996 to 2021, position mark mentioned, known and recognised by the majority of the Dutch population.
- Undated, Polish Handball Federation (ZPRP), signed by the managing director Rafal Staniec, the applicant has been the sponsor of the Polish handball national team from 2005 to 2014, position mark mentioned, known and recognised by the majority of the Polish population.
- 1 May 2021, Romanian Handball Federation (FRH), signed, applicant has been sponsor of the Romanian national handball team for several years, position mark mentioned, known and recognised by the majority of the Romanian population.

Traders and licensees of the applicant's goods

- 25 September 2020, Sportmaster (sports clothing shop), retailer of the applicant's goods in Denmark, signed by purchasing chief Heike Dreyer, position mark mentioned, applicant's trade marks are known and recognised by the majority of the Danish population.
- 29 October 2020, sport 24 (sports clothing shop), retailer of the applicant's goods in Denmark, signed by the buyer manager Klaus Lidgel, position mark mentioned, applicant's trade marks are known and recognised by the majority of the Danish population.
- 22 March 2021, INA Sport, retailer of the applicant's goods in the Czech Republic, Slovenia and Poland, signed by the accounting officer, position mark mentioned, applicant's trade marks are known and recognised by the majority of the Czech population.
- 12 February 2018, sport 2000, retailer of applicant's goods, signed by Andreas Rudolf, annex not translated, applicant's position mark or shoes not mentioned.
- 15 February 2018, Intersport Deutschland eG, retailer of the applicant's goods, signed by Uwe Poppe and Time Bielhoubeck, position mark cited, sale of shoes in Germany since 1980, a large number of associated traders offer and distribute many Hummel comodelles with the applicant's position mark.

- 30 March 2021, Hummel France, exclusive licensee in France, signed by Cefeuvne Naxide, Director of Finance, position mark mentioned, the applicant's trade marks are known and recognised by the majority of the French population.
- 23 March 2021, Hummel Polska, exclusive licensee in Poland, signed by the head of country, position mark mentioned, applicant's trade marks are known and recognised by the majority of the Polish population.
- 5 February 2018, Deventrade, Benelux licensee, signed by Marcel Brink, Senior Merchandise Planner, position mark and angles on shoes not mentioned, shoes mentioned as part of the applicant's range, sales in Benelux since 1985, the applicant is the third largest supplier of team sports clothing.
- 24 March 2021, Deventrade, Benelux Licensee, signed by the Director, massively promoted in Benelux for decades and known by the Benelux people.
- 5 April 2021, HummelIberica, exclusive licensee in Spain and Portugal, more than 1 000 shops, signed by Jose Garcia Alcaraz, position mark mentioned, applicant's trade marks are known and recognised by the majority of the Spanish and Portuguese population.
- 25 March 2021, MeraSport, exclusive licensee in Romania, signed by Director Maria Pop, position mark mentioned, applicant's trade marks are known and recognised by the majority of the Romanian population.

All the above statements, except those of 5 February 2018, Deventrade, 12 February 2018, Sport 2000, and 15 February 2018, Intersport Deutschland eG, conclude that the angles:

- in our view, it is clearly attributable to Hummel
- has been massively promoted and exposed in X population for decades;
- is known and recognised by the vast majority of X population.

Other:

- 23 May 2017, Danish Mode and Tekstil, signed by Thomas Klaussen Director and Creative Director As Øland, the applicant, is a member, but the declaration states that this has no influence on the statement, position mark mentioned, the applicant's trade mark has appeared on shoes in the fashion sector since 1984 and is known in Denmark and the rest of the EU.
- 1 February 2018, Bundesverband der Deutschen SportArtiel-Industrie e.V, [Association of German producers of sports noise and equipment], signed by Nicole Espey, director, position mark mentioned, position mark known by the German population.

Information on market share, turnover and sales

- Breakdown of turnover for footwear, 2015-2019, EU-wide except Cyprus, minimum turnover DKK 108 million (around EUR 14,4 million).
- Overview of turnover for footwear, Hummel International, 2007-2009, turnover and sales figures for footwear, EU wide.
- Overview of sales figures (units) of footwear, 2010-2016, EU wide.
- Extract from report, Lithuania, 2013-2014, distributor in Lithuania concludes that Hummel has a leading market position in Lithuania: no 1 on the wholesale market and No 4 on the retail market.
- Extracts from invoices from Sweden, France, Slovenia and Poland, 2014-2016.

Previous registration certificates and decisions

Registration certificates

- IR 1 313 403 for Germany, Italy, Spain, Benelux, Lithuania, Sweden
- VR 2016 01285 for Denmark
- VR 1987 03157 and R 2016 01286

Decisions

- 20/11/2020, R 2557/2019-5, NICOBOCO (fig.)/DEVICE OF TWO CHEVRON SHAPES (Figure).
- 02/02/2014, Hamburg Regional Court, O 0621/13, 10/03/2016, Hamburg District Court, 315 O 81/16, 26/05/2016, Hamburg District Court, 327 O 210/169, 15/04//2016, Hamburg District Court, 326 O 400/15
- 16/10/2015, OHIM, application for revocation, 000009100C
- 10/07/2014, Maritime and Commercial Court, A-005-14, 08/11/2017, Maritime and Commercial Court, V-67/16.
- 10/7/2019, PTO Spain, 3742846/2, 17/05/201, PTO Spain, 4064574/6.

Advertising, marketing and promotion

Sponsorship (extract)

- Sponsor of the Danish and Lithuanian national football teams for several years.
- Sponsor of the Danish, Dutch, Polish, Romanian handball national team for several years.
- Sponsor of the international federations IHF, EHF, SEHA for several years.
- Sponsor at the World Cup.
- Sponsor of 7 out of 14 Danish football clubs in the best row.
- Sponsor of many well-known athletes across the EU, including in Belgium, Denmark, France, Germany, Lithuania, the Netherlands, Poland, Romania, Slovenia, Spain and Sweden.
- Sponsor of the e-sport team Astralis.

Sponsorship information is supported by information on players' scoring, playing matches, images of the applicant's brand and shoes with angles (position mark), and viewing figures for matches and tournaments.

Campaigns (extracts):

- Marathon campaign: reached a total of 28,5 million, 5 EU countries, position mark shown.
- Reflex total: reached a total of 5 million, 6 EU countries, position mark shown.
- SLIM STADIL: 5 million, 7 EU countries, position mark shown.
- Winter Pack: reached a total of 28,5 million, 4 EU countries, position mark shown.

Second PR (extract):

- Roskilde Festival, Denmark, 2015-2017, 130 000 visitors, PR value more than DKK 2 million in 2015.
- Sziget Festival 2012, Hungary, 380 000 visitors, applicant's shoes promoted in the festival programme.
- Applicant's shoes placed in top-100 for indoor sports footwear and top-100 for snow-axle footwear. Additional information
- Best Athletic women's collection of the year in 2004 and Global style award in 2007.

Other:

- Extract from catalogues, 2004-2016, dated, position mark shown.
- Press releases on cooperation with other well-known brands, such as Haribo.
- Articles from a wide range of magazines and newspapers referring to Hummel and showing the position mark.

Marketing investments:

- Approximately DKK 25 million per year on shoes with angles.

Shops and the Internet

- Overview of visitors to the applicant's website www.hummel.net, 2011-2017, all EU countries.
 - Overview of Hummel's Facebook followers, all EU countries.
 - Documentation of shops or other sales outlets for the applicant's goods, most countries.
- 6 On 18 October 2021, the examiner adopted a decision ('the contested decision') rejecting the applicant's claim that the trade mark applied for has acquired distinctive character through use pursuant to Article 7(3) EUTMR. The decision was based on the following main findings:
- The applicant has invested significant resources in marketing across the EU, in particular through sponsors and campaigns focused on sport. It can be assumed that by sponsoring major international sports events with many viewers and famous athletes, the applicant has ensured that the entire EU population has been exposed to the applicant's position mark.
 - The intensive marketing efforts should be supported by other evidence that the relevant consumers will consider the applicant's trade mark to belong to the applicant (Hummel A/S).
 - The applicant provided market studies for only two countries, only one of which can be considered sufficient to demonstrate the perception of the trade mark by the relevant consumers.
 - The vast majority of statements came from sponsors and licensees rather than from independent third parties. The applicant was a member of one of the two trade associations that made declarations – the Danish organisation. The statement by the Danish trade association took a position on the acquired distinctive character of the position mark throughout the EU.
 - The applicant has not demonstrated its market share in the footwear market for any country other than Lithuania. The applicant has also not provided general data on the total sales of footwear in the EU as a basis for comparison with its turnover and sales figures.
 - Two fifths of the applicant's turnover comes from Denmark and the turnover in Germany is about half of the turnover in Denmark, although Germany has a population approximately 14 times larger than in Denmark.
 - If the other countries are compared to Denmark, it cannot generally be concluded that the applicant has SMP in all countries, as it is assumed that the applicant has more or less the same competitors in all countries.
- 7 On 1 February 2022, the applicant lodged an appeal against the contested decision, seeking to have the decision set aside in its entirety. The statement of grounds of the appeal was received on 1 February 2022.

Grounds of appeal

- 8 The arguments put forward by the applicant in the statement of reasons can be summarised as follows:
- In the context of the contested decision, there was not a reasonable overall assessment of the evidence submitted, but too much focus on the dissemination of knowledge in the individual EU countries – large and small – which, in a globalised

world with blurred borders, in particular in the EU, may appear illusory. The Board of Appeal is hereby requested to carry out an overall assessment of the evidence submitted and to note that it has not been possible for the applicant to obtain complete information from all EU countries.

- In particular, when international sporting events, such as the world-famous English Premier League, as well as the major handball tournaments EM, World Cup and Champions League, are shown throughout the European Union, it must also be assumed that awareness of the trade mark applied for will increase in all the Member States of the European Union.
- The purpose of sponsorship is precisely exposure to recognition and knowledge, and as the Office states that ‘there is no doubt that the applicant has devoted a lot of resources to marketing itself throughout the EU, in particular through sponsorship and campaigns focusing on the sports world, and it must be assumed that by sponsoring large international sports contests with many viewers and famous athletes, the applicant has ensured that the entire population of the European Union has been exposed to the applicant’s position mark’, it must also be assumed that exposure has a positive impact on awareness of the trade mark applied for throughout the EU.
- The fact that this is the case is supported by the sales figures and invoices provided, of which, however, given the huge volume of invoices, only representative examples have been provided.
- Thus, it should not be prejudicial to the applicant that the incorporation effect of its very extensive marketing at international level is less measurable in each country compared to if, for example, it had sponsored a national handball tournament or similar. Therefore, where the whole of the European Union is exposed to that very extensive international marketing of the trade mark applied for, it must be assumed that that marketing affects the degree of reputation in all countries.
- This must also be read in conjunction with the fact that the mark applied for has been consistently used for almost 100 years from its development in 1923 (see page 12-13 of the contested decision), which means that the European market has been exposed to the trade mark applied for for many decades.
- The fact that Europe’s two most influential handball organisations cooperate with the applicant, inter alia in the supply of shoes, says much about the iconic status of the trade mark applied for in European handball.
- Two further statements of turnover figures (for 2012-2016 and 2016-2020 respectively) have been submitted as Annexes 233 and 234.

Justification

- 9 All references made in this Decision shall be construed as references to European Union Trade Mark Regulation (EU) 2017/1001 (OJ 2017 L 154, p. 1), which is a codification of Regulation (EC) No 207/2009 as amended, unless this Decision expressly provides otherwise.
- 10 The appeal complies with Article 66, Article 67 and Article 68(1) EUTMR. It is admissible.

Scope of the complaint

- 11 In the present case, the contested decision concerning the examiner's assessment of the alternative claim under Article 7(3) EUTMR was the subject of an appeal in its entirety. The present appeal therefore concerns the question whether the conditions for the application of Article 7(3) EUTMR are met.

The additional evidence submitted in the appeal proceedings;

- 12 The applicant has submitted additional evidence during the appeal proceedings. It is therefore necessary to examine whether it is admissible. Pursuant to Article 95(2) EUTMR, the Office may disregard facts or evidence which are not submitted in due time by the parties concerned.
- 13 As the Court has held, it follows from the wording of that provision that, as a general rule and unless otherwise specified, the submission of facts and evidence by the parties remains possible after the expiry of the time limits to which such submission is subject under the provisions of the EUTMR and that EUIPO is in no way prohibited from taking into account facts and evidence which are submitted or produced late (13/03/2007, C-29/05 P, ARCOL, EU:C:2007:162, § 42) and (18/07/2013, C 621/11-P, Fishbone, EU:C:2013:484, § 22).
- 14 By clarifying that, in such cases, the Office 'may' decide to disregard evidence, Article 95(2) EUTMR gives the Office a wide margin of discretion to decide, giving reasons for doing so, whether to take that evidence into account (13/03/2007, C 29/05 P-, ARCOL, EU:C:2007:162, § 43) and (18/07/2013, C 621/11 P,-Fishbone, EU:C:2013:484, § 23).
- 15 According to Article 27(4) EUTMR, the Board of Appeal may accept facts and evidence submitted for the first time before it, provided that those facts and evidence meet two requirements. First, it must be stated that they appear, prima facie, to be relevant to the outcome of the case. Secondly, it must be held that those facts and arguments were not submitted in good time for valid reasons, in particular if they merely supplement relevant facts and evidence which had already been submitted in due time or are submitted to challenge findings made or examined at first instance of their own motion in the contested decision.
- 16 In the present case, the conditions for accepting evidence submitted late by the applicant in the appeal proceedings, as Annexes 233 and 234, are met. The information provided in the appeal proceedings is 'additional' and 'complementary' to the earlier information, in so far as it elaborates on the evidence of acquired distinctive character submitted in the proceedings at first instance (see, in relation to 'additional' and 'complementary' evidence, by analogy, judgment of 11/12/2014, T 235/12-, Shape of a blade of grass in a bottle, EU:T:2014:1058, § 89 and the case-law cited).
- 17 In addition, it may also have a 'decisive impact' on the outcome of the application submitted to the Office and its final conclusions.

Acquired distinctive character of the sign (Article 7(3) EUTMR)

- 18 A trade mark may acquire a distinctive character in consequence of the use which has been made of it within the meaning of Article 7(3) EUTMR.
- 19 Under Article 7(3) EUTMR, the absolute grounds for refusal referred to in Article 7(1)(b), (c) and (d) of that regulation do not preclude the registration of a trade

- mark if, in consequence of the use which has been made of it, that mark has acquired distinctive character in relation to the goods or services for which registration is sought.
- 20 According to the case-law, in order to have the registration of a trade mark approved under Article 7(3) EUTMR, the distinctive character acquired through the use of that mark must be demonstrated in the part of the European Union where it was devoid of any distinctive character per se (21/04/2010, T 7/09,-Spannfutter, EU:T:2010:153, § 40 and the case-law cited).
 - 21 In the case of a trade mark which is devoid of any distinctive character from the outset in all the Member States, such a trade mark may be registered under that provision only if it has been proved that it has acquired distinctive character through use throughout the European Union (25/07/2018, C 84/17P-, C 85/17P C-95/17P-, SHAPE OF A 4-FINGER CHOCOLATE BAR (3D), EU:C:2018:596, § 76 and the case-law cited therein; 06/09/2018, c-547/17 P, rappresentazione DI TRE STRISCE VERTICALI (fig.), EU:C:2018:682, § 25).
 - 22 It is true that, in paragraph 62 of the judgment of 24 May 2012, C-98/11 P, Chokoladefabriken Lindt Sprüngli v OHIM (C-98/11 P, EU:C:2012:307), the Court of Justice held that, while it is true that the acquisition of distinctive character through use must be proved in respect of the part of the European Union in which that mark did not have such distinctive character ab initio, it would be excessive to require proof of its acquisition to be furnished for each Member State (25/07/2018, C 84/17P-, C 85/17P -C-95/17P-, SHAPE OF A 4-FINGER CHOCOLATE BAR (3D), EU:C:2018:596, § 77; 06/09/2018, c-547/17 P, rappresentazione DI TRE STRISCE VERTICALI (fig.), EU:C:2018:682, § 26).
 - 23 However, it does not follow from that recital that, where a trade mark is devoid of distinctive character per se throughout the European Union, it is sufficient, for the purposes of obtaining registration as a trade mark under Article 7(3) EUTMR, to adduce evidence that it has acquired distinctive character through use in a significant part of the European Union where that proof has not been furnished in each Member State (25/07/2018, C 84/17P, C 85/17P, C-C-95/17P, SHAPE-OF A 4-FINGER CHOCOLATE BAR (3D), EU:C:2018:596, § 78; 06/09/2018, c-547/17 P, rappresentazione DI TRE STRISCEVERTICALI (fig.), EU:C:2018:682, § 25).
 - 24 In that regard, it emphasises the distinction between, on the one hand, the facts to be proved, namely the acquisition of distinctive character through use of a sign which is not in itself distinctive, and, on the other hand, the evidence capable of establishing those facts (25/07/2018, C 84/17P-, C 85/17P, C-, SHAPE OF A 4-FINGER CHOCOLATE BAR (3D), EU:C:2018:596, § 79).
 - 25 Thus, none of the provisions of the EUTMR requires proof that distinctive character has been acquired through use in each Member State. It cannot therefore be excluded that evidence that a particular sign has acquired distinctive character through use may be relevant for several Member States, or even for the European Union as a whole (25/07/2018, C 84/17P-, C 85/17P-, C C-95/17P, SHAPE OF A 4-FINGER CHOCOLATE BAR (3D), EU:C:2018:596, § 80).
 - 26 While it is not necessary, for the purposes of registering, on the basis of Article 7(3) EUTMR, a trade mark which is devoid of distinctive character from the outset in all the Member States of the European Union, for each Member State to be proved that that trade mark has acquired distinctive character through use, the evidence submitted must be capable of demonstrating the acquisition of distinctive character in all the Member

States of the European Union (25/07/2018, C 84/17P, C-85/17P C-95/17P, SHAPE-OF A 4-FINGER CHOCOLATE BAR (3D), EU:C:2018:596, § 83; 06/09/2018, c-547/17 P, rappresentazione DI TRE STRISCE VERTICALI (fig.), EU:C:2018:682, § 28.

- 27 The question whether the evidence submitted is sufficient to establish that a particular sign has acquired distinctive character through use in the part of the European Union in which that sign did not have such distinctive character from the outset is a matter for the assessment of the evidence, which it is for the departments of the Office to carry out in the first place (25/07/2018-, C 84/17P, C 85/17P C-95/17P-, SHAPE OF A 4 – finger CHOCOLATE BAR (3D), EU:C:2018:596, § 84).
- 28 That means, however, that if, after assessing all the evidence submitted to it, the departments of the Office consider that some of that evidence is sufficient to establish that a particular sign has acquired distinctive character through use in the part of the European Union in which it was initially devoid of any distinctive character and is therefore capable of justifying the registration of that sign as an EU trade mark, they must clearly indicate that decisive point in their respective decisions (25/07/2018, C 84/17P-, C 85/17P, C C-95/17P-, SHAPE OF A 4-FINGER CHOCOLATE BAR (3D), EU:C:2018:596, § 86 and the case-law cited).
- 29 For the purposes of the application of Article 7(3) EUTMR in cases where a trade mark which is devoid of distinctive character per se throughout the European Union must be proved that that mark has acquired distinctive character through use throughout that territory and not only in a significant part or the majority of the European Union, so that, although such proof may be adduced globally for all the Member States concerned or separately for different Member States or groups of Member States, it is not sufficient: that the person responsible for proving such distinctive character is limited to proving that it has been acquired in a manner which does not extend to a part of the European Union, whether or not it concerns a single Member State (25/07/2018, C 84/17P, C 85/17P, C-C-95/17P, SHAPE-OF A 4-FINGER CHOCOLATE BAR (3D), EU:C:2018:596, § 87).
- 30 It is also apparent from the case-law that, in order for a trade mark to acquire distinctive character through use, it is necessary that a significant proportion of the relevant class of persons in the part of the European Union in which the mark was devoid of distinctive character per se identify at least the goods or services as originating from a particular undertaking. However, the circumstances in which the condition relating to the acquisition of distinctive character through use may be regarded as satisfied cannot be established solely on the basis of general and abstract data, such as certain percentages (21/04/2010, T-7/09, Spannfutter, EU:T:2010:153, § 39; 22/03/2013, t-409/10, Borsa, EU:T:2013:148, § 75).
- 31 In order to assess whether a trade mark has acquired distinctive character through use, account must be taken, inter alia, of the market share held by the mark, the intensity, geographical extent and duration of use of that mark, the size of the investment made by the undertaking in promoting the mark, the proportion of the relevant class of persons who identify the goods as originating from a particular undertaking because of the mark, and statements made by chambers of commerce and industry or other professional associations. If, on the basis of those factors, the relevant class of persons, or at least a significant proportion of them, identify the goods as originating from a particular undertaking because of the trade mark, it must be concluded that the requirement for registration of the mark laid down in Article 7(3) EUTMR is satisfied (21/04/2010, T

7/09,-Spannfutter, EU:T:2010:153, § 41; 22/03/2013, t-409/10, Borsa, EU:T:2013:148, § 77).

- 32 The acquisition of distinctive character may result both from the use of an element of a registered trade mark, as part of that mark, and from the use of a separate mark together with a registered trade mark. However, in order to establish whether distinctive character has been acquired, the applicant must nevertheless show that, unlike any other mark which may also be present, that mark itself indicates the origin of the goods as originating from a particular undertaking (07/12/2017, T-333/16, 360° (fig.), EU:T:2017:875, § 48 and the case-law cited). In other words, in order to prove that distinctive character has been acquired through use as an element of a composite trade mark, it is not sufficient to prove use of the mark as a whole (by analogy, Opinion of the Advocate General in C-353/03, EU:C:2005:61, § 43; 16/09/2015, c-215/14, Nestle KIT KAT, EU:C:2015:604, § 66 and reference therein to the Advocate General's Opinion in C-215/14, Nestle KIT KAT, EU:C:2015:395, § 49).
- 33 In the light of the foregoing considerations, it is necessary to examine whether the applicant has demonstrated that the contested mark had acquired distinctive character through the use which has been made of it, within the meaning of Article 7(3) EUTMR.
- 34 Following the first decision of the examiner in the case, the contested mark is, from the outset, devoid of any distinctive character throughout the European Union. Thus, by its alternative claim, the applicant must demonstrate that the contested mark has acquired distinctive character through the use which has been made of it, within the meaning of Article 7(3) EUTMR, in all the Member States of the European Union.
- 35 In support of its claim that the sign applied for has acquired distinctive character through use, the applicant submitted the evidence referred to in paragraph 5 above and the additional evidence submitted together with the statement of reasons, namely two tables of turnover figures. All in all, the evidence can be summarised as follows:
 - **Sales brochures, catalogues and price lists:** Extracts from several catalogues of years 2004-2015 show that the trade mark applied for has been consistently marketed in the European Union over a long period of years. For the sake of good order, it should be noted that the extracts provided are merely examples and that the applicant has published many similar catalogues every year.
 - **Invoices:** Examples of invoices with very significant numbers of shoes sold with the trade mark applied for have been provided to Sweden, France, Slovenia and Poland respectively. For the sake of good order, it is stressed that these are examples and that several corresponding invoices for these and the other EU countries have been omitted for reasons of procedural economy.
 - **Annual reports:** In support of the applicant's arguments concerning distinctiveness through acceptance, annual reports are provided in Annex 233 and Annex 234, which together show the applicant's net turnover for the years 2012-2020. Pages 11 and 10 respectively of these Annexes show huge net turnover from these years. In particular, it should be noted that the net turnover for the years 2016-2020 has been consistently well above DKK 1 billion. The vast majority of these amounts concern Croatia, the Czech Republic, Belgium, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Italy, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain and Sweden.

- **Turnover figures:** The applicant's very large sales figures for shoes are presented in Annexes 51, 79, 80 and 161. In addition, several reports have been submitted by distributors in several EU countries. See also 'annual reports' above.
 - **Advertising investment figures and reports:** Examples of marketing campaigns, often accompanied by evaluation and results reports, can be found in Annexes 32, 33, 45, 47, 48, 49, 50, 52, 53, 56, 57, 58, 59, 60, 61, 68, 82, 129, 130, 131, 132, 133, 151, 159 and 171. The reports show a very wide scope and investment. There are also all supporting documents relating to the sponsorship of the applicant, including those of well-known athletes and sports clubs.
 - Advertising (press cuttings, billboards, TV advertising) and evidence of their intensity and reach: See 'Advertising investment figures and reports' above.
 - **Customer and/or market research:** Market surveys for Denmark and Poland are set out in Annexes 12, 13 and 166.
 - **Declarations on honour:** The applicant has produced numerous statements from, inter alia, EU-based distributors and official national and international handball federations, recognised sports clothing shops and sports clubs, all of which confirm that the trade mark applied for is perceived as a trade mark by the relevant class of persons and that its use has been lengthy and intensive.
- 36 Having assessed the abovementioned material (with the exception of annual reports submitted to the Board of Appeal for the first time), the contested decision concluded that there is no doubt that the applicant has devoted a lot of resources to marketing itself throughout the European Union, in particular through sponsorship and campaigns focused on the sports world, and by sponsoring major international sporting events with many viewers and famous athletes, it must also be assumed that the entire population of the European Union has been exposed to the mark applied for. Notwithstanding the above, it cannot generally be concluded that the applicant has significant market power in all countries, so that the trade mark applied for is not considered to have been accepted by the Office.
- 37 The applicant disputes that conclusion, arguing, in essence, that the size of its directly documented market position in each EU country – large or small – which may appear illusory in a globalised world with blurred borders, particularly in the EU, is given greater weight. In particular, when international sporting events such as the world-famous English Premier League, as well as the major handball tournaments EM, the World Cup and the Champions League, are shown throughout the EU, the applicant takes the view that it is reasonable to assume that awareness of the trade mark applied for will also increase in all EU countries. Furthermore, the mere fact that customers in the sports shoes sector are aware of the tradition of affixing trade marks to the side of shoes cannot be regarded as a 'special position' to counter the opposition under Article 7(1)(b) EUTMR (13/04/2011, T 202/09, Footwear, EU:T:2011:168-, § 32; 30/10/2012, R 174/2011-2, DEVICE OF A TRAINER WITH 5 STRIPES (FIG. MARK), § 27, confirmed in 13/06/2014, T-85/13, Trainer with 5 stripes, EU:T:2014:509), but should not be disregarded in the overall assessment of the evidence submitted under Article 7(3) EUTMR.
- 38 As the applicant rightly points out, the existence of the goods in a globalised world and the fact that consumers are aware of the practice in the sports shoes sector, that is to say,

of affixing trade marks to the side of the shoes, are relevant. However, those factors cannot, as such, lower the standard of assessment of distinctive character acquired through use laid down in the relevant case-law cited above (25/07/2018, C 84/17P-, C-95/17P, SHAPE OF A 4-FINGER CHOCOLATE BAR (3D), EU:C:2018:596, § 87).

- 39 In the present case, in the light of the documents before the Court, the Board of Appeal will proceed as follows:

Group 1:

Belgium, Denmark, the Netherlands, Germany and Hungary.

Group 2:

Bulgaria, Croatia, Cyprus, Czech Republic, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden.

- 40 It appears from the file that between 2015 and 2019 the applicant's annual turnover from the sale of shoes in the EU as a whole, with the exception of Cyprus, was over DKK 108 million (EUR 14,8 million). The applicant also provided information on turnover and sales for the period 2007-2009 for each country, including Cyprus. The applicant also provided sales figures for shoes sold in 2007-2020, broken down into categories of shoes, all with a position mark affixed to the shoe. These figures show that the turnover of shoes varies considerably from country to country.
- 41 All in all, the evidence submitted shows that the mark at issue affixed to the shoes has been used for a long time by the applicant in the countries in Group 1, in particular in Denmark. Apart from significant sales figures in these countries, two market studies have been carried out in Denmark which show that angles are associated with the applicant. There have also been long and intense activities involving sponsorship for athletes, teams and events in Denmark and, to a lesser extent, in the other countries covered by this group.
- 42 The evidence for group 1 as a whole consists of a list of sponsorship for athletes and sports teams, sales of shoes and the number of visitors to the applicant's websites. Sales figures vary in these countries. In other countries, such as France and Italy, a significant number of shoes were sold in the order of tens of thousands. In some countries, such as Portugal and Slovakia, only minimal sales were made. However, the applicant has explained in this respect that the invoices are only examples since the goods are sold through different distributors and it was therefore not possible for the applicant to provide all sales figures. In this respect, the applicant has provided evidence that some distributors cover more than one country, for example that certain figures for Portugal are included in the total turnover for Spain or that the figures for Austria are included in the Dutch and German sales figures respectively.
- 43 In that regard, the Board of Appeal points out that, in order to rely on distinctive character in order to obtain registration of an EU trade mark, it is not necessary to adduce evidence of acquisition of distinctive character in each Member State. If the applicant treats a group of Member States as an internal market for the purpose of distribution or marketing, proof of use in such a cross-border market could be relevant for all the Member States concerned. Given the uniqueness of the EU, it is not possible to ignore entire regions and markets, but account can be taken of the geographical size and distribution of the regions in which distinctive character has been acquired in order to ensure that the evidence constitutes a quantitative and geographically representative

sample (25/07/2018, C 84/17P-, C 85/17P C-95/17P-, SHAPE OF A 4-FINGER CHOCOLATE BAR (3D), EU:C:2018:596, § § 83-86).

- 44 Furthermore, the Board of Appeal considers that the results relating to the acquisition of distinctive character in other Member States, in particular Belgium (Group 1), can be extrapolated to Luxembourg, relying on the wording of the Court of Justice in paragraphs 82 to 80 of the judgment in SHAPE OF A 4-FINGER CHOCOLATE BAR and Others. In that regard, the Board of Appeal notes that Belgium and Luxembourg already formed an economic union for the purposes of marketing and distribution.
- 45 The evidence submitted by the applicant to the examiner together with the turnover tables submitted to the Board of Appeal therefore allows the Board of Appeal to reasonably conclude that there are significant sales in all the Member States of the European Union.
- 46 In addition, on the basis of the information available, it can be concluded that the applicant has made considerable efforts to market the footwear with the desired sign, as demonstrated by the marketing investments made in the Member States in both groups.
- 47 As rightly stated in the contested decision, the applicant has been strongly represented for several decades at major national and international sporting events, such as the EM and the World Cup, both as sponsor of official events and as sponsor of teams or players.
- 48 In support of that exposure, the applicant has also provided evidence of attendance and viewing figures for the sporting events in question. For example, in Norway, EM had 1,2 billion viewers.
- 49 Last but not least, the Global Broadcast Report for 2018/19 by Nielsen Sports (cited on page 2777 of the file), an independent research agency cited by the applicant, which produces and collects broadcasting and viewing information from individual markets in the European Union, shows an increase in the number of viewers accompanying those competitions around the world, which amounts to 1,03 billion households.
- 50 The applicant has also provided evidence of the number of consumers reached by its marketing campaigns, such as the 'Winter Pack' campaign, which reached 28,5 million consumers.
- 51 The applicant has also demonstrated its commitment to cooperation with designers, joint marketing efforts by leading companies in the fashion sector (including sports clothing and footwear), such as, inter alia, the following:

Astrid Andersen Partner With Hummel For Latest Collab

Instagram post by astridandersen on August 24, 2022



Launching today, the twelve-piece ready to wear capsule collection sees the pairing of Denmark's oldest sportswear brand, [Hummel](https://hummel.net/en/ explore) (<https://hummel.net/en/ explore>

52 This is an incentive for increased presence on social media/consumer interests, accompanied by, inter alia, the Social Media Report, Everton kit launch 3-July 2020, which contains information on followers, which is subsequently divided into different social media channels such as Instagram, Twitter, Facebook and others.

EVERTON RESULT OVERVIEW ALL HUMMEL SOME CHANNELS 3/7-5/7*



- 53 The applicant has also indicated how many followers Hummel has on Facebook per country, and on Facebook consumers may also be exposed to the applicant's shoes.
- 54 In addition, the applicant has provided an overview of visitors to its website, www.hummel.net, for each country in the EU. As visitors to the applicant's website visit several pages, it is reasonable to assume that consumers are very likely to be exposed to the applicant's shoes during a visit. As rightly stated in the contested decision, there are the highest number of visitors to the website from Denmark, Germany, Spain and France (between 89 000 and 290 197 unique users) and the fewest in Estonia and Cyprus (between 686 and 812 unique users).
- 55 The applicant has also sponsored major sports stars who have worn and promoted the applicant's brand, including shoes, on social media.
- 56 In this context, the applicant has insisted on the importance of the statements submitted by, inter alia, EU-based distributors and official national and international handball federations and football federations, recognised sports clothing shops and sports clubs, etc., as it has not been given sufficient weight by the applicant. This applies in particular to the statements of the IHF International Handball Association and the European Handball Federation EHF.
- 57 The Board of Appeal notes that it is indeed apparent from the documents before the Court that the federations received sponsorship from the applicant only from 2018 and 2020 respectively and that, in their statements, they express their views on the exposure of the mark applied for in a historical context dating back several decades.
- 58 The Board of Appeal agrees with the applicant that the fact that the two largest and most important and influential handball organisations in Europe had incidentally received sponsorship from the applicant for a few months and a half years respectively at the time of filing the application for registration of the trade mark applied for should not prevent them from commenting on the mark applied for in a professional manner from a historical perspective, when those two organisations have the most knowledge in that area throughout Europe.
- 59 Taking into account that evidence and the applicant's presence at European competitions, the Board of Appeal considers it reasonable to conclude that the trade mark has become iconic in the European handball context because it has been massively promoted and exposed in Europe over a number of years. According to the statements, far from

applying only to the associations' own sponsoring activities, but primarily to the applicant's historical promotion through European handball clubs, players and events, and extensive sales in both online and brick-and-mortar shops in Europe, which therefore have nothing to do with the federations.

- 60 The same considerations as those set out above apply, moreover, to the statements of the Dutch, Polish and Romanian handball federations and the Lithuanian Football Association, as they speak from a historical perspective that goes far beyond the period of sponsorship.
- 61 Finally, it should be noted that the signed declarations have been submitted by very large players in the sport sector from different countries. For example, AGF and Brøndby IF are some of Denmark's largest and most renowned football clubs, and Sportmaster and Sport 24 are Denmark's largest sports clothing shops and INAsport from the Czech Republic, and BSI, Intersport, SPORT 2000 from Germany.
- 62 Although some of the statements were made by entities linked to the applicant, for example by sponsorship agreements, the fact remains that, given the nature of the sector, sponsorship of the world-famous English Premier League and the major handball tournaments EM, World Cup and Champions League or the IHF International Handball Federation and the EHF, by, inter alia, supplying sports shoes bearing the trade mark applied for, cannot be relied on against the applicant by attributing less weight to that evidence. Conversely, contrary to the conclusion of the contested decision, it demonstrates that consumers are exposed to the strong presence of the applicant's goods (sports shoes) bearing the mark at issue.

Conclusions

- 63 The evidence of acquisition of distinctive character submitted must be examined as a whole, taking into account, in particular, but not only, the market share held by the mark and the intensity, frequency and duration of use of the mark. As stated above, it is necessary to prove that, by virtue of the contested position mark, a significant part of the relevant public is in itself able to identify footwear as originating from the applicant.
- 64 Moreover, contrary to the reasoning of the examiner, it does not follow from the case-law that, in order to assess whether distinctive character has been acquired through use, it is necessary to take into account established percentages relating to the market shares or the degree of recognition of the relevant class of persons (19/06/2014, C-217/13 C-218/13, Oberbank e.a., EU:C:2014:2012, § 48). Instead of referring to a fixed percentage of the relevant public on a given market, the evidence should show that a significant proportion of the public identifies the product or service in question as originating from a particular undertaking by virtue of the trade mark.
- 65 The Board of Appeal examined carefully the extensive evidence submitted by the applicant and, contrary to the contested decision, found that the contested mark had acquired distinctive character.
- 66 That said, the Board of Appeal agrees with the applicant's argument that the examiner did not attach sufficient weight to long-lasting and very extensive international marketing (including in the EU), which is admittedly less measurable in each country as compared to the presentation of invoices for separate territories, for example. Moreover, the examiner has in fact ignored the nature of the applicant's sports shoe industry and focused too much on the market position in each EU country, which, according to the Board of Appeal, has in any event been established.

- 67 In short, sales figures, market shares, advertising expenses, examples of advertising and recognition and presence at major sporting events applicable to all Member States lead to the conclusion that, at the time of the contested trade mark application, a significant proportion of the relevant class of persons had been accustomed to the position mark on shoes as used by the contested mark, not so long ago, that is to say in 2020.
- 68 The proven use has been intensive and extremely long. It is apparent from the documents before the Court that the mark at issue has been affixed to the applicant's shoes for almost 100 years, that is to say, from 1923 (reference is made to the applicant's 2015 Lookbook, from which the position of the trade mark is shown on a shoe dating from 1923).

1923



without alterations which alter the distinctive character:



- 69 An overall assessment of the evidence leads to the conclusion that the relevant consumer has been able to identify the goods bearing the contested heading mark as originating from the applicant.
- 70 For the sake of consistency, the Board of Appeal duly notes that the evidence submitted by the applicant in the present case was supplemented by the deficiencies found in Cases 15/02/2019, R 2604/2017-5, FORM OF EN SPORTS SKO (fig.), already examined by the Board of Appeal, which concluded, in essence, that there were no market studies or statements from trade associations that would allow the appeal to be upheld.
- 71 In the present case, on the other hand, the applicant has remedied the above shortcomings by submitting a large number of declarations from various trade associations across the EU, together with summaries of turnover figures, and the invoices relate to all countries and are closer to the relevant application date.
- 72 It follows that the complaint must be upheld and that the contested decision must be annulled in its entirety. Allow the contested mark to be published in respect of the goods at issue;

Decision

On those grounds, the COURT OF FIRST INSTANCE

THE BOARD HEREBY

this means that:

- 1. annul the contested decision;**
- 2. allow the publication of EU trade mark application No 18 256 549 for the goods applied for.**

signed

G. Humphreys

signed

M. Bra

signed

A. González Fernández

Registrar:

signed

H. Dijkema

